86-849

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. WOODRICK,

Petitioner,

v.

CAPTAIN PETER B. HUNGERFORD, *el al.*,

Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court should use the doctrine of exhaustion of administrative remedies rather than the doctrine of *Schlesinger v. Councilman*, 420 U.S. 728, when considering an application for habeas corpus to intervene in a court-martial that lacks *in personam* jurisdiction over the offender?

2. Whether a person who is induced into the all-volunteer forces by material misrepresentations in a military contract must exhaust administrative remedies before applying in a federal court for habeas corpus relief and contract recission?

3. Whether under the Federal Rule of Civil Procedure 52 a court of appeals can ignore a district court's nonerroneous findings that exhaustion of administrative remedies would be futile and cause petitioner to suffer irreparable harm?

CERTIFICATE OF INTERESTED PERSONS

The Undersigned, counsel of record for petitioner, Andrew J. Woodrick, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Justices of this Court may evaluate possible disqualifications or recusal.

ANDREW J. WOODRICK ..... Petitioner

CAPTAIN PETER B. HUNGERFORD ..... Respondent

COLONEL TERRY C. ISAACSON ... Respondent

MAJOR GENERAL CARL R. SMITH ..... Respondent

HONORABLE VERN ORR ..... Respondent

DATE: November 20, 1986
San Antonio, Texas

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ANDREW J. WOODRICK,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John M. Economidy, on behalf of Andrew J. Woodrick, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed the U.S. District Court for the Western District of Texas and vacated the latter's habeas corpus writ.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is reported at 800 F.2d 1413. The opinions of the district court (App. B and C, *infra*, 14a, 16a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a was entered October 1, 1986. A petition for rehearing was denied October 30, 1986 (App. E, *infra*, 21a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

2. Article 2, Uniform Code of Military Justice, 10 U.S.C. § 802, provides in relevant part:

(a) The following persons are subject to this chapter [the U.C.M.J.]:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

* * *

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes

of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

3. Article 138, Uniform Code of Military Justice, 10 U.S.C. § 938, provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

4. Manual for Courts-Martial, United States, 1984, Rule of Court-Martial 1003b(10) provides in relevant part:

(10) *Punitive separation.* A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal.* Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial . . .

(B) *Dishonorable discharge.* A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial . . .

* * *

(C) *Bad conduct discharge.* A bad conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B).

5. Air Force Regulation 39-10 (Discharge Regulation) provides in relevant part:

1-16. Authorized Types of Separation:

a. Each part of this regulation that authorizes separation tells whether separation with a service characterization is authorized. Characterization of service, if authorized, may be:

(1) Honorable;

(2) General (Under Honorable Conditions); or

(3) Under Other Than Honorable Conditions.

b. If separation with a service characterization is not authorized, the separation will be described as:

(1) Entry level separation;

(2) Release from the custody and control of the Air Force by reason of void enlistment; or

(3) Dropped from the rolls of the Air Force.

2-19. Release From Void Enlistment. A person whose status or condition barred the creation of a valid enlistment may be found to be serving in a void enlistment, if the condition still exists. This includes, but is not limited to, persons who are legally insane, minors still under the legal age for enlistment, or deserters from another Service. For more information, see paragraph 5-13.

* * *

b. When the evidence shows an enlistment may be void for a reason other than minority, send the case to HQ AFMPC/MPCAKE for decision. Include a full report of the facts and circumstances. Act promptly in these cases to avoid retention of a person whose military status is void. The finding of a court-martial that it lacks jurisdiction because of a defective enlistment does not void the enlistment. Administrative action is necessary to find whether a specific enlistment is void, voidable, or valid. The evidence needed in these cases varies with the condition involved. It must show how the creation of a valid enlistment was barred at the time it was attempted. There must also be evidence to show the condition is still present. For example, when sanity is at issue, the medical statements must address the person's mental competency at the present and at the time of enlistment.

* * *

4-1. Basis for Discharge [In Lieu of Trial by Court-Martial].

a. Airmen may be discharged under this provision if they:

(1) Are subject to trial by court-martial; and

(2) Request discharge in lieu of trial.

b. Airmen may request discharge if charges have been preferred with respect to an offense for which a punitive discharge is authorized. If section B, paragraph 127c, Manual for Courts Martial (MCM) is the sole basis for a punitive discharge, they may not request discharge in lieu of trial unless the charges have been referred to a court-martial empowered to adjudge a punitive discharge.

4-2. Types of Discharge Authorized. The fact that the airman is triable by a court-martial that could adjudge a punitive discharge reflects the serious nature of the conduct. Customarily the service of airmen discharged under this provision will be characterized as under other than honorable conditions. For guidance in determining the type of separation, see chapter 1, section B.

a. If the airman is in entry level status, and discharge under other than honorable conditions is not warranted, the separation will be described as an entry level separation.

b. For other airmen, the separation may be characterized as:

(1) General, ~~when~~ such a characterization is warranted under the guidelines in chapter 1, section B; or

(2) Honorable, only if the member's record has been so meritorious that any other service characterization would be inappropriate.

6. Air Force Regulation 110-19 on Complaints of Wrong Under Article 138 provides in relevant part:

2. Scope:

a. Except for complaints that involve pretrial and post-trial confinement, complaints relating to military discipline under the Uniform Code of Military Justice, including Article 15 nonjudicial punishment, are not cognizable as Article 138 complaints under this regulation.

7. Air Force ROTC Regulation 45-10, Figure 3-13, ¶ 2(a)(6), at 79 provides:

Advise that POC/CSP [Professional Officer Course/College Scholarship Program] does not confer military status upon cadets. Although they are enlisted in the ORS [Obligated Reserve Section], they are regarded as civilians under the military justice system so long as they retain their cadet status, and as such are not subject to the provisions of the Uniform Code of Military Justice.

8. Federal Rule of Civil Procedure 52 provides in relevant part:

Rule 52. Findings by the Court

(a) Effect. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the

trial court to judge of the credibility of the witnesses. . . .

* * *

STATEMENT OF THE CASE

Andrew Jackson Woodrick, the petitioner, signed ROTC and enlistment contracts based upon the military's inducement, stated in the service's contracts and medical reports, that he was medically qualified to be a pilot. Thereafter, Woodrick participated in Air Force ROTC at Memphis State University. Prior to graduation, a precommissioning medical examination discovered that Woodrick was color blind and could not be a pilot. Because the Air Force misrepresented his pilot qualifications, Woodrick quit AFROTC. The Air Force involuntarily called Woodrick to active duty as an enlisted man. Woodrick refused to report. His commander, respondent Captain Peter B. Hungerford, preferred court-martial charges of desertion against him and recommended prosecution by general court-martial.

On advice of counsel, Woodrick refused military pay to avoid a constructive enlistment. He filed an application for habeas corpus on April 10, 1985. The district court had jurisdiction under 28 U.S.C. §§ 2241(a), (c)(1) and (3), 1331, 1651, and 2201. He sought recission of his enlistment contract and separation from the service. He also filed a motion for a restraining order to enjoin the court-martial. The Air Force agreed to a voluntary stay.

Two Air Force ophthalmologists then examined Woodrick. They concluded he had defective color vision, that this defect was likely inherited and in ex-

istence at the time of his initial Air Force physical examination and at the time of his enlistment, that he was disqualified to be a pilot under Air Force vision standards, and that the defect was too severe to be waived.

The District Court found that the Air Force's statement in its contract that Woodrick was medically qualified to be a pilot candidate was a material misrepresentation of fact upon which Woodrick justifiably relied in executing his military contracts and therefore Woodrick's military contracts were void and subject to recission. Since there was no contractual basis, the court concluded that the Air Force lacked jurisdiction to hold Woodrick and had deprived him of his liberty, without due process of law, in violation of the Fifth Amendment of the U.S. Constitution. The district court also found that it had to intervene as Woodrick's imminent court-martial could not determine the validity of his contractual claims. Should Woodrick be convicted of violating a defective contract without a prior determination of the validity of the contract, the district court concluded that a grave injustice would occur. The district court granted Woodrick's petition for habeas corpus and other requested relief.

Respondents appealed. The court of appeals reversed the district court and vacated the habeas writ. The appeals court first held that the district court and counsel should not have considered *Schlesinger v. Councilman,* 420 U.S. 738, which sets the standard on federal court intervention in a court-martial. Although court-martial charges had been preferred and proceedings were stayed, the court of appeals held that the court-martial was immaterial to the request

for habeas corpus relief and recission of contracts. The court of appeals ignored this Court's decision in *Schlesinger*.

For the first time, the court of appeals held that a servicemember seeking recission of an enlistment contract must exhaust administrative remedies before seeking habeas corpus relief. The court of appeals recognized an exception to the rule when the applicant showed it would be futile to pursue administrative remedies or that he would suffer irreparable injury. By adopting the findings of the magistrate, the district court had found both exceptions, but the court of appeals concluded, without discussion and in violation of Fed. R. Civ. P. 52, that Woodrick had not met his burden.

The court of appeals saw three possible administrative remedies. First, they suggested a discharge in lieu of court-martial. The court noted disagreement over the significance of such a discharge, with Woodrick contending this would be a stigmatizing separation under conditions of disgrace and dishonor and an admission to a crime he did not commit.

The court of appeals then suggested that Woodrick seek relief through the Air Force Board for Correction of Military Records. The court said it was unclear that the board had the power to separate Woodrick, citing *Pence v. Brown,* 627 F.2d 872 (8th Cir. 1980).

Lastly, the court of appeals recommended a complaint of wrong under Article 138, Uniform Code of Military Justice, 10 U.S.C. § 938. This remedy would fail as Woodrick was not a "member of the armed forces" entitled to use Article 138. This provision also

would not be available as it was ROTC officials and medics who wronged Woodrick, not his commander.

Petitioner sought a rehearing to correct factual and legal errors. The motion for rehearing was denied. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons: First, the Fifth Circuit's ruling was in conflict with *Schlesinger v. Councilman,* 420 U.S. 738 (1975), which was directly applicable to this case. Second, the Fifth Circuit erred in requiring exhaustion of ineffectual and lengthy administrative actions prior to seeking habeas corpus and recission action for defective enlistments. Third, with the abolition of selective service appeal procedures with the demise of the draft, the thousands of young persons who annually enlist in the all-volunteer armed forces need to know from their Government their rights and remedies when induced into enlistment contracts by material misrepresentations. These latter two points are important questions of federal law that need to be decided for application to the all-volunteer armed forces.

Historically, a person wrongfully detained in the military by a commander is "in custody" as required by the habeas corpus statute. *Strait v. Laird,* 406 U.S. 341 (1972); *Parisi v. Davidson,* 405 U.S. 34 (1972). Habeas corpus is an appropriate procedural remedy for questioning the legality of an enlistment or an induction into military service. *Jones v. Cunningham,* 371 U.S. 236 (1963)(dictum). Never before has exhaustion been required. Federal habeas corpus relief was particularly important to petitioner as it would divest a court-martial of jurisdiction over him.

The Fifth Circuit was clearly wrong in rejecting the *Schlesinger v. Councilman* analysis.

That case held a federal court normally will not intervene in a court-martial that acts within the scope of its jurisdiction and duty. The Court gave three reasons for its decision. First, military courts could adequately determine subject matter jurisdiction. Second, federal courts should not exercise equitable jurisdiction to intervene with a court-martial as long as the latter can enforce rights and avoid duplicative proceedings. Third, Congress created a specialized system of military justice that can adequately perform its functions in a specialized society separate and apart from the civilian section. All three reasons were absent here.

1. No Court-Martial Jurisdiction.

Subject matter jurisdiction existed for the alleged offense of desertion. However, the Air Force lacked *in personam* jurisdiction over Woodrick who was neither lawfully called to active duty under Article 2(a) nor constructively enlisted under Article 2(c), Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 802(a) and (c). Article 2(a) requires the individual to be "lawfully called or ordered" to duty. Because the material misrepresentations in the enlistment and AFROTC contracts created a defective enlistment, petitioner was not "lawfully" called to active duty. Further, an enlistment induced by material misrepresentations cannot be a "voluntary" one, as required by Article 2(b), U.C.M.J., 10 U.S.C. § 802(b). When there is misrepresentation of a material fact in an enlistment contract, enlistment is not voluntary within the meaning of Article 2(b).

Petitioner did not constructively enlist under Article 2(c). He did not voluntarily submit to military authority. He was arrested and placed in pretrial detention. He did not receive military pay. He refused military pay from his arrest to his release. He did not perform military duties. He was attached to an administrative holding unit.

Further, the Air Force would not be aided if petitioner constructively enlisted under Article 2(c). That subsection applies only to "a person serving with an armed force," who is thereby made "subject to this chapter [the U.C.M.J.]." A person "subject to the U.C.M.J." may be prosecuted for violating most of the punitive articles of the U.C.M.J. A particularly military offense like desertion under Article 85, U.C.M.J., 10 U.S.C. § 885, however, requires the Air Force to prove beyond reasonable doubt the element that the alleged offender is "a member of the armed forces." *United States v. McDonagh,* 15 M.J. 415, 422 (C.M.A. 1983); *United States v. Marsh,* 15 M.J. 252 (C.M.A. 1983). Proof that a person constructively enlisted and thus was made "subject to the U.C.M.J." does not make the person "a member of the armed forces" under Article 85.

When Article 2(a) and (c) do not apply in a defective enlistment, as here, the enlistment contract is defective from inception. The person is neither "subject to this chapter [the U.C.M.J.]" nor a "member of the armed forces," and a court-martial lacks jurisdiction over the person. *United States v. Russo,* 1 M.J. 134 (1975); *United States v. Burden,* 1 M.J. 89 (1975); *United States v. Barrett,* 1 M.J. 74 (1975); *United States v. Catlow,* 23 C.M.A. 142, 48 C.M.R. 758 (1974).

Where a court-martial lacks jurisdiction over a person, as here, habeas corpus relief was appropriate. *Schlesinger v. Councilman, supra; McElroy v. United States ex rel. Guagliardo,* 361 U.S. 281 (1960); *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234 (1960); *Reid v. Covert,* 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1950). The Fifth Circuit ignored this factor. Such relief would be especially appropriate when a court-martial cannot vindicate petitioner's rights and avoid duplicative proceedings.

2. Equitable Jurisdiction.

A court-martial lacks power to rescind appellee's contracts and then administratively separate him from active duty. A court-martial can separate only when an accused is found guilty and then sentenced to a punitive discharge—dismissal for an officer and either a bad conduct or dishonorable discharge for enlisted personnel. Rule of Court-Martial 1003(b)(10), Manual for Courts-Martial, United States, 1984.

Under military case law, an accused in a court-martial cannot raise misrepresentations in an enlistment contract as a defense; the accused's remedy is to seek habeas corpus relief in the federal courts. *United States v. Jarrell,* 12 M.J. 917, 920 (N.M.C.M.R.), *pet. denied,* 14 M.J. 224 (C.M.A. 1982); *United States v. Imler,* 17 M.J. 1021 (N.M.C.M.R. 1984). As a result, the district court concluded Woodrick could not obtain from a court-martial the relief he seeks, citing *Parisi v. Davidson, supra,* 405 U.S., at 41-42 ("Under accepted principles of comity, the court should stay its hand only if the relief petitioner seeks—discharge as a conscientious objector—would also be available to him with reasonable promptness

and certainty through the machinery of the military judicial system in its processing of the court-martial charge."). If a court-martial found that it lacked jurisdiction over the person, petitioner would then have to seek relief in yet another proceeding, such as federal court or an administrative discharge proceeding. Indeed, the directive on discharges, Air Force Regulation 39-10, ¶ 2-19b acknowledges the need for further administrative proceedings. Thus, petitioner's imminent court-martial failed the two tests in *Councilman* to defer equitable jurisdiction the ability to grant the requested relief and avoidance of duplicative proceedings. Again, the Fifth Circuit ignored this factor.

3. No Distinctive Military System Involved

Councilman noted that the military can adequately perform its functions in a specialized society separate and apart from the civilian sector. This factor was not sufficiently present to deter the district court from granting habeas corpus relief in this case.

First, military enlistment contracts are justiciable and reviewable by the federal courts. *Ferrell v. Secretary of Defense,* 662 F.2d 1179 (5th Cir. 1981); *Shelton v. Brunson,* 465 F.2d 144 (5th Cir. 1972); Annot., Modern Status of Military Enlistment Contracts, 62 A.L.R. Fed. 860 (1983).

Second, interpretation of petitioner's contracts required no special military expertise. Third, ROTC and enlistment contracts do not involve a distinct military society separate and apart from the civilian sector. Instead, the armed forces compete with the civilian sector in hiring young men and women. The military annually spends over a hundred million dollars in the

civilian sector to advertise guaranteed military skills. The federal courts need not defer claims of false military recruiting techniques to the armed forces for resolution. The civilian sector has as strong an interest in having enlistment promises fulfilled as the military has in meeting recruiting goals.

4. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies, including those recommended by the Fifth Circuit, is not required in this case.

First, exhaustion of administrative remedies is not a jurisdictional doctrine, but one subject to the discretion of the district court. *N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers,* 391 U.S. 418, 426 n. 8 (1968). This fact was even acknowledged in *Mindes v. Seaman,* 453 F.2d 197, 202 (5th Cir. 1971) (leading Fifth Circuit case on exhaustion of administrative remedies on internal military affairs) ("We do not intimate how these factors should be balanced in the case *sub judice.* That is the trial court's function.").

Second, this Court has unanimously held that the doctrine of exhaustion of administrative remedies has little application in the context of a criminal proceeding. *McKart v. United States,* 395 U.S. 185 (1969). The Fifth Circuit's newly created exhaustion doctrine creates the same harsh doctrine condemned in *McKart:* petitioner is stripped of his only defense and must go to jail without having any judicial review of his invalid contract.

Third, and significantly, the typical youngster coming into the military will lack the financial resources of Woodrick. By the time the servicemember exhausts

administrative remedies, he or she will have had to accept military pay to survive. Indeed new recruits are paid shortly after starting basic training. The person would thus be constructively enlisted under Article 2(c), U.C.M.J., thus rendering moot his or her issue that the enlistment contract was defective.

Fourth, the administrative remedies recommended by the court of appeals are defective.

The court of appeals suggests that Woodrick spend over a year processing an application through the Air Force Board of Correction of Military Records (AFBCMR). This is the very type of duplicative proceeding condemned in *Councilman* and *McKart*. Further, exhaustion is not required if the administrative relief does not provide a genuine opportunity for adequate relief or if the individual would suffer irreparable injury if compelled to pursue his administrative remedies. *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980); *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974).

As the court of appeals noted, AFBCMR's authority to rescind petitioner's contracts and to separate him is unclear. Indeed, the government conceded that the board lacks such authority on its own; the board, in another proceeding, must recommend such action to the Secretary of the Air Force.

AFBCMR would not provide timely, adequate relief. Here, the military selected a criminal arena. Woodrick needed immediate relief. Seeking relief at AFBCMR would not avert a general court-marital. Even should Woodrick be acquitted, he would have to remain involuntarily in the Air Force while he duplicates his efforts in another time-consuming proceeding. The

district court correctly held that Woodrick need not exhaust his administrative remedies before seeking habeas corpus.

Woodrick cannot seek relief from his plight under Article 138, U.C.M.J., 10 U.S.C. § 938. First, Article 138 does not apply. Article 138 requires that "the servicemember be wronged by his commanding officer." Woodrick was not wronged by his commander—he was wronged by a non-commander, the doctors and AFROTC officials who said he was medically qualified to be a pilot. A servicemember lacks a cognizable Article 138 complaint when someone other than the commander has committed the wrong.

Second, complaints related to military discipline under the U.C.M.J., as here, are not cognizable under Article 138. Air Force Regulation 110-19, ¶ 2a. Third, Article 138 applies only to a "member of the armed forces." Since Woodrick's enlistment contract was defective, he was a civilian and not a "member of the armed forces." He could not even use Article 138 as an AFROTC cadet.

It is asserted that Woodrick has available to him requesting discharge in lieu of a trial by court-martial. This assertion is incorrect and misleading. A discharge in lieu of a court-martial is a separation under disgrace and dishonor. It is reserved for serious offenses that warrant a punitive discharge. It is an acknowledgement that the person committed all elements of the alleged offense. Woodrick did not commit the alleged offense, and he is not going to seek separation under conditions of disgrace and dishonor when it is the Air Force that has committed the wrong. The Fifth Circuit would require Woodrick to suffer an adverse administrative discharge (erro-

neously stated by that court as a dishonorable discharge [which only a general court-martial can impose]), then seek correction at AFBCMR, and then come to the federal courts!

Second, the service of an airman discharged in lieu of court-martial is usually characterized as "under other than honorable conditions." This is the very worst type of administrative discharge. It means the individual would be stigmatized for life with a discharge under other than honorable conditions. Woodrick cannot receive an uncharacterized "entry level separation." He does not qualify for it as he has over 180 days of service.

CONCLUSION

The District Court correctly applied *Schlesinger v. Councilman* to intervene in petitioner's court-martial, properly excused exhaustion of futile administrative remedies, and correctly granted the writ of habeas corpus and terminated petitioner's military contracts. The decision of the court of appeals should be reversed and the district court's judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2567
OPINION

ANDREW J. WOODRICK,
Petitioner-Appellee,

v.

CAPTAIN PETER B. UNGERFORD, U.S.A.F., ET AL.,
Respondents-Appellants.

Filed October 1, 1986

Before: Thomas Gibbs Gee, Henry A. Politz, and Will Garwood, Circuit Judges.

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court for the Western District of Texas Edward Prado, District Judge, Presiding

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SUMMARY

Habeas Corpus

Appeal from grant of petition for writ of habeas corpus. Reserved and vacated.

- Petitioner Woodrick underwent a physical exam for the purpose of determining whether he was medically qualified

for entry into a pilot training program. That examination determined that he was so qualified, and specifically found that he had passed the color vision test. Woodrick then applied and was accepted into the AFROTC program. During the second and final year of AFROTC, Woodrick underwent a physical wherein he failed the color vision test, which, if true, disqualified him from flying. Woodrick stopped attending classes, did not retake the color vision test and failed to appear for duty. He was declared AWOL, arrested and charged with desertion. In the meantime, Woodrick was examined by two Air Force opthamologists, both of whom concluded that he was color-blind, that this defect was likely a congenital one and therefore in existence at the time of his initial examination and later enlistment, and that it was too severe to be waived for pilot qualification purposes. Woodrick's civilian counsel filed a habeas petition in the district court, requesting that Woodrick's enlistment contracts be rescinded. The district court accepted the Magistrate's findings and recommendations that the habeas petition be granted. The Air Force appeals.

[1] This court addresses the issue of whether the court erred in granting Woodrick's requested relief—rescission of his enlistment contracts and separation from the Air Force—before he had exhausted his intraservice remedies. The court-martial proceeding is immaterial to that question. [2] Where a serviceman seeks to effect a rescission of his enlistment contract by means of the a federal habeas writ, he must show that he has exhausted all available intraservice remedies. [3] This court recognizes an exception to the exhaustion doctrine, where the petitioner is able to demonstrate that pursuit of intraservice remedies would be futile, or would cause him to suffer irreparable harm. [4] It is clear that Woodrick has not shown that pursuing his available intraservice administrative remedies would have been futile. Nor has he shown that he would have suffered irreparable injury in so doing.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

In the spring of 1980, Andrew Woodrick, a student at Memphis State University, discussed with representatives of the on-campus Air Force Reserve Officer Training Corps (AFROTC) program the possibility of his entering that program with the ultimate goal of earning an officer's commission and his wings as a pilot. In 1980, as a result of these discussions, Woodrick underwent a Department of Defense physical examination for the purpose of determining whether he was medically qualified for entry into a pilot training program upon receiving a commission. That examination determined that he was so qualified, and specifically found that he had passed the color vision test.

Woodrick then applied for and was accepted into the two-year AFROTC program. In September 1981 he executed three documents: (1) an AFROTC contract; (2) an enlistment/reenlistment document; and (3) a statement of understanding. The contract required Woodrick to enter a professional officer course as a cadet in ROTC and to accept a commission in the Air Force Reserve upon receipt of his baccalaureate degree and completion of the AFROTC commissioning requirements. The contract noted that Woodrick was designated a "line officer" candidate, with a planned commissioning date of May 1983, and that he was qualified to be a pilot candidate.

Under the enlistment document, Woodrick enlisted in the Air Force Reserve for a minimum of six years, and the statement of understanding provided that he could be ordered to active duty in his enlisted grade for a period of two years if he was

> discontinued from the AFROTC professional officer course for any of the following reasons:
>
> (1) Indifference to training,
>
> (2) Disciplinary reasons,

(3) Breach or anticipatory breach of the terms of the contractual agreement,

(4) Declining to accept a commission.

Pursuant to his contractual obligations, Woodrick took an oath as an enlisted man in the Air Force Reserve, enrolled in the AFROTC unit at Memphis State as a cadet in the fall semester of 1981, and was paid a monthly stipend as his ROTC contract provided. The 1981-82 school year apparently went by without any problems.

In October 1982, during the fall semester of his senior year (and second and final year of AFROTC), Woodrick underwent a precommissioning physical. The report of that examination stated that Woodrick failed the color vision test, which, if true, disqualified him from flying. Woodrick was advised, however, that he was not medically disqualified from flying until the physical had been reviewed by the Surgeon General's office at the Headquarters Air Training Command. That office requested that an Air Force flight surgeon re-evaluate his color vision and that Woodrick retake the test.

Woodrick, however, upon learning the results of his physical, stopped attending AFROTC classes and did not retake the color vision test. On January 6, 1983, an investigation was ordered to determine if Woodrick should be expelled from AFROTC for cause, that is, his failure to attend classes. Woodrick was advised of the possible consequences of the investigation (including possible call to active duty as an enlisted man), and given the opportunity to cross-examine witnesses and present evidence on his own behalf. The investigating officers concluded their task with a recommendation that Woodrick be expelled from AFROTC for breach of his contract. The ROTC commander concurred, and Woodrick was dropped from the unit. Woodrick was then ordered to active duty, in enlisted status, effective May 31, 1984.

Woodrick did not report for duty on that date and was declared AWOL. After failing to appear for duty within 30 days, he was classified a deserter. On March 21, 1985, Woodrick was arrested at his home in Nashville by two off-duty civilian police officers who recovered a federal bounty for their efforts. He was handed over to military authorities and transported to Lackland Air Force Base in San Antonio.

Woodrick was kept in detention for 18 days, and then released from confinement but ordered to report to 3731st Personnel Processing Squadron, an administrative holding unit at Lackland. On advice of civilian counsel, Woodrick refused military pay to avoid a constructive enlistment. Woodrick's commanding officer proceeded with charges of desertion against Woodrick under Article 85 of the Uniform Code of Military Justice (UCMJ), ordering an investigation into the desertion charges and requesting findings as to whether prosecution of Woodrick before a court-martial was warranted. In the meantime, Woodrick was examined by two Air Force opthamologists, both of whom concluded that Woodrick was indeed color-blind, that this defect was likely a congenital one and therefore in existence at the time of his initial examination and later enlistment, and that it was too severe to be waived for pilot qualification purposes.

On April 10, 1985, the day following that of his assignment to the 3731st Squadron, Woodrick's civilian counsel[1] filed a habeas petition in the district court in San Antonio, requesting that Woodrick's enlistment contracts with the Air Force be rescinded on grounds of either fraudulent inducement or mutual mistake and that the Air Force be ordered to grant him an honorable discharge. The government answered the petition and moved to dismiss on the grounds that Woodrick had failed to exhaust

[1] Military judge advocates are prohibited by military directive from seeking habeas relief in federal courts.

his available remedies and that his contract claims were without merit. Woodrick then applied for a temporary restraining order enjoining the respondent from proceeding with the pre court-martial investigation pending disposition of his petition.

The district court referred the matter to a United States Magistrate, who found that the Air Force's statement (on the basis of the preliminary physical in 1980) that Woodrick was medically qualified to be a pilot candidate was a material misrepresentation of fact upon which Woodrick justifiably relied in executing his enlistment agreements and thus that Woodrick's military contracts were subject to rescission. Since the initial contracts were void, the Magistrate reasoned, Woodrick had not enlisted and the Air Force was without jurisdiction over him. The Magistrate recommended that Woodrick's habeas petition be granted.

The district court, after a de novo review, accepted the Magistrate's findings and recommendations and denied the Air Force's motion to dismiss for lack of jurisdiction. The court reasoned that its interference with the court-martial proceeding was proper, given that that proceeding could not determine the merits of Woodrick's contractual claims.

The court then heard the contractual issues, the Air Force declining to present evidence on grounds that the court lacked jurisdiction and ordered that the habeas petition be granted, that the Air Force immediately separate Woodrick, and that he be relieved of any obligations under the contracts, on the ground that the contracts were void for error. The order did not, however, require an honorable discharge for Woodrick, presumably because if his initial contracts were void, Woodrick's status never changed and there was no occasion for him to be discharged. The Air Force appeals.

It is important at the outset to understand precisely what relief Woodrick seeks through his habeas application.

His petition sought only rescission of the AFROTC and enlistment contracts and his separation, not intervention in the court-martial. Woodrick later filed a motion for a temporary restraining order to enjoin the court-martial proceeding pending a resolution of his contractual claims, but this motion became moot when the Air Force agreed to stay that proceeding pending disposition of the habeas petition.

[1] The parties unnecessarily expend a great deal of energy debating *Schlesinger v. Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975) and the requirements for intervention in a court-martial by a civilian court. The issue here, however, is one of timing: whether the court erred in granting Woodrick's requested relief—rescission of his enlistment contracts and separation from the Air Force—before he had exhausted his intraservice remedies. The court-martial proceeding is immaterial to that question.

This distinction is significant: although the federal courts have habeas corpus jurisdiction over claims of unlawful detention by members of the military, *Peavy v. Warner*, 493 F.2d 748, 749 (5th Cir. 1974), the standard of review varies with the military decision or action complained of. *Id.* Habeas corpus review of courts-martial is limited to questions of jurisdiction and to the severely limited function of determining whether the military has given fair consideration to petitioners' claims, *Id.*, whereas claims that enlistment contracts have been breached or are invalid are decided under traditional canons of contract law. *Id.* at 750; *Ferrell v. Secretary of Defense*, 662 F.2d 1179, 1181 (5th Cir. 1981); *Peavy v. Warner, supra*, 493 F.2d at 750; *Shelton v. Brunson*, 465 F.2d 144, 147 (5th Cir. 1972). It is clear that exhaustion of administrative remedies is required before a civilian federal court can intervene in the proceedings of a court-martial, *Schlesinger v. Councilman, supra*, 420 U.S. at 758. It is not clear under our precedents that such an exhaustion of administrative

remedies must precede the invocation of the Great Writ to rescind an enlistment contract.

We have never directly addressed this question. In *Ferrell v. Secretary of Defense, supra,* where the petitioner had unsuccessfully sought rescission of his contract through the Board of Corrections of Naval Records (BCNR), we denied rescission because the Navy had neither breached its contract nor misrepresented any material fact to induce Ferrell to enlist; whether the BCNR application was a prerequisite to our action was not considered. And in both *Peavy v. Warner* and *Shelton v. Brunson, supra,* we held, without any mention of administrative remedies, that servicemen induced through material misrepresentations to sign enlistment contracts could seek rescission through habeas relief in the federal courts. In neither case does it appear that administrative remedies were sought.

On the other hand, speaking of a serviceman who *objected* to his discharge, we have declared, in sweeping language, that:

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice correction measures.

Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). We followed *Mindes* in *Hodges v. Callaway,* 499 F.2d 417, 419 (5th Cir. 1974) and *Von Hoffburg v. Alexander,* 615 F.2d 633, 637 (5th Cir. 1980). Both, like *Mindes,* were cases where servicemen challenged their discharges through habeas writs in the federal courts; and in each a failure to exhaust administrative remedies resulted in dismissal of the petition. Both cases recognize exceptions to the exhaustion doctrine:

(1) Where administrative remedies would be futile, and

(2) where the petitioner might suffer irreparable injury if he is compelled to pursue administrative remedies.

Von Hoffburg, supra, 615 F.2d at 638. At least one other circuit, however, has stated that a lesser showing than one of irreparable injury, e.g., mere hardship, is sufficient to invoke the exception. *Seepe v. Dept. of Navy,* 518 F.2d 760, 762 (6th Cir. 1975).

[2] We must therefore first determine whether we should apply the exhaustion doctrine of *Mindes, Hodges,* and *Von Hoffburg* to cases such as *Ferrell, Peavy, Shelton* and the one at bar, cases in which servicemen challenge the validity of their enlistment contracts. In addition to the usual reasons for requiring use of established procedures before countenancing a resort to litigation, the need for limiting civil court intervention in internal military affairs weighs strongly in the scales. Among those matters from which even an omnicompetent judiciary[2] should shrink is running the military, a task for which we have few resources and even less competence.[3] We therefore hold that where a serviceman seeks to effect a rescission of his enlistment contract by means of the habeas writ in federal court, he must show that he has exhausted all available intraservice remedies. We recognize an exception to this rule, however, where the petitioner is able to demonstrate that pursuit of intraservice remedies would be futile, or would cause him to suffer irreparable harm. We must therefore consider whether Woodrick has established that it would have

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[2] See N. Glazer, "Towards an Imperial Judiciary," *The American Commonwealth: 1976,* at 104-123 (Basic Books, 1976).

[3] Although, as two former sergeants and a former lieutenant, we doubtless possess more competence than your garden-variety panel of judges.

been futile to pursue the intraservice remedies available to him or that in so doing he would have suffered irreparable injury.

[3] The Air Force contends that Woodrick had three remedies available to him: (1) Request for Discharge in Lieu of Trial by Court-Martial Pursuant to Air Force Regulation 39-10; (2) Petition to the Air Force Board of Correction of Military Records (AFBCMR); or (3) a Complaint Against His Commanding Officer for Wrongs Pursuant to Art. 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938.

Under AF Regulation 39-10, Chapter 4, any serviceman subject to trial by court-martial may request a discharge in lieu of trial from his unit commander, who forwards it to the officer exercising special court-martial jurisdiction over the petitioner, who in turn forwards it to the General Court-Martial authority (GCM) for action. Such a request delays court-martial proceedings until final action on the request is taken. The GCM authority is authorized to discharge the petitioner from the Air Force administratively.

The parties strenuously disagree over the significance of a discharge in lieu of court-martial, with Woodrick contending it is a separation under a disgrace and dishonor, and "in effect an acknowledgement that the individual committed all elements of the alleged offense." The Air Force concedes that Woodrick is likely to receive a general discharge or discharge without service characterization, but notes that an honorable discharge is not out of the question. The pertinent regulations require such a discharge to be honorable unless it is pursuant to "an approved sentence of a court-martial" or "approved findings of a board of officers" or the individual concerned "consents" to a less than honorable discharge.

Assuming, arguendo, that anything less than an honorable discharge amounts to an irreparable injury, there has been no showing by Woodrick that this remedy would

have been futile, since it is possible that Woodrick could have obtained an honorable discharge through this avenue. Even were the result a dishonorable discharge, relief could still be sought in federal court.

The Air Force argues that Woodrick also had a remedy in the form of a petition for honorable discharge from the AFBCMR. Under 10 U.S.C. § 1552, each branch of the service has established a Board for the Correction of Military Records. These boards are authorized to "correct any military record . . . when . . . necessary to correct an error or remove an injustice." § 1552(a).

It is not clear that the AFBCMR possesses power to separate Woodrick from the Air Force. In *Pence v. Brown*, 627 F.2d 872 (8th Cir. 1980), an officer claimed that a material misrepresentation by the Air Force caused him to sign enlistment contracts. Before invoking the Great Writ in the district court, he applied to the AFBCMR for precisely the same relief that Woodrick seeks: rescission of the contracts and an honorable discharge. The AFBCMR "stated that it did not have the authority to grant him a discharge, an issue the Board thought best suited for a civil court." *Id.* at 875 n.5. In today's case, however, after the district court granted Woodrick's petition the Air Force submitted an affidavit from the Secretary of the Board indicating that it was empowered to grant a discharge.

Assuming, arguendo, that the Corrections Board has the authority to rescind Woodrick's contracts and to discharge him, Woodrick contends that the lengthy process of application to the Board would cause him to suffer irreparable injury because the court-martial proceeding against him could in the meantime proceed. Even so, Woodrick could have petitioned the Board once he learned that he was not medically qualified to fly. Court-martial became a threat only when Woodrick unilaterally ceased to meet his ROTC training obligations. Had the petition to the Board

been unsuccessful, the habeas remedy would then be available.

The Air Force finally argues that Woodrick had a remedy under Art. 138 of the UCMJ, 10 U.S.C. § 938. It provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Woodrick maintains that Art. 138 does not apply because he was not wronged by his AFROTC unit commander but rather by his initial medical examiners. However, Woodrick rebutted that argument by contending that his ROTC commander had the authority and duty under Air Force Regulation 39-10 to investigate his contractual claims and initiate separation action. The commander, of course, failed to do so, and Woodrick was therefore entitled under Art. 138 to bring the matter to the attention of that officer's superior.

Woodrick also cites USAF Regulation 110-19 § 2a which provides that complaints related to military discipline are not cognizable under Article 138. However, Woodrick's "complaint" does not relate to military discipline; it relates to his allegedly void enlistment contracts. The Military Courts have recognized the applicability of Art. 138 to

enlistment contract rescission claims. *United States v. Imler*, 17 M.J. 1021, 1025 (N.M. C.M.R. 1984).

[4] It is clear that Woodrick has thus not shown that pursuing his available intraservice administrative remedies would have been futile. Nor has he shown that he would have suffered irreparable injury in so doing. Accordingly, we REVERSE the direct court and VACATE the habeas writ.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-85-CA-1224

ANDREW J. WOODRICK,

Petitioner,

VS.

CAPTAIN PETER B. HUNGERFORD, Commander, Headquarters Squadron, Basic Military Training School, USAF; COLONEL TERRY C. ISAACSON, Commander, Basic Military Training School, USAF; and MAJOR GENERAL CARL R. SMITH, Commander, Air Force Military Training Center; all Lackland, Air Force Base, Texas; and VERNE ORR, Secretary of the Air Force,

Respondents.

O R D E R

The Court on this date heard petitioner's application for writ of habeas corpus, respondent's motion to dismiss, and the entire record. Also before the Court is the Magistrate's Findings and Recommendations and Respondents' objections. The Court has conducted a de novo review of these issues objected to and finds subject matter jurisdiction exists and that an evidentiary hearing will be required on the contract issues. The Court hereby accepts and approves the Magistrate's Findings and Recommendations on all jurisdictional grounds raised. The Court is of the opinion that respondent's motion to dismiss should be denied.

In so ruling, the Court has seriously considered Respondents' demand for comity as mandated by the

Supreme Court in *Parisi v. Davidson,* 405 U.S. 34, 46 (1972). The Court finds it must intervene in this case because the court-martial itself is not convened to determine the validity of the petitioner's enlistment contract, but to determine the criminal issues that stem from the breach of what petitioner claims is an unenforceable contract. Should petitioner be convicted of violating a void or voidable contract without a prior determination of the validity of the contract, a grave injustice would ensue. Respondent has shown the Court no authority which convinces the Court that petitioner will not risk irreparable harm should the court-martial be permitted to determine the criminal desertion issue before first settling the contract issues.

Based upon the verified application of petitioner Andrew J. Woodrick seeking the issuance of a Writ of Habeas Corpus and upon the exhibits attached thereto,

It is ORDERED that all parties shall appear before the Court for a hearing upon petitioner's application for Writ of Habeas Corpus at 9:00 a.m., June 5, 1985, in the United States District Court, Courtroom # 4, third floor, John H. Wood, Jr. United States District Courthouse, 655 E. Durango, San Antonio, Texas.

It is FURTHER ORDERED that, pending said hearing and the Court's disposition of the application, respondents shall refrain from subjecting petitioner to basic military training and shall retain the petitioner in custody in this district, pending further order of this Court.

SIGNED and ENTERED this 3rd day of June, 1985.

/s/ EDWARD C. PRADO
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-85-CA-1224

ANDREW J. WOODRICK,

Petitioner,

vs.

CAPTAIN PETER B. HUNGERFORD, Commander, Headquarters Squadron, Basic Military Training School, USAF; COLONEL TERRY C. ISAACSON, Commander, Basic Military Training School, USAF; and MAJOR GENERAL CARL R. SMITH, Commander, Air Force Military Training Center; all Lackland Air Force Base, Texas; and VERNE ORR, Secretary of the Air Force,

Respondents.

ORDER

On June 5, 1985, a hearing was held to hear oral arguments and any additional evidence on the petitioner's writ of habeas corpus. Respondent reurged its Motion to Dismiss the case on grounds of lack of jurisdiction and the general principles of comity. The Court denied reconsideration and offered to hear any additional evidence and argument on the validity of the enlistment contract.

The facts and legal issues of this case are thoroughly discussed in the Magistrate's Findings and Recommendation to the Court and need not be repeated here. In 1980, petitioner underwent a physical examination at a Naval Air Station at the direction of AFROTC officials at Mem-

phis State University. Petitioner was told that he passed his color vision test and was judged medically fit for flight training. Petitioner presented uncontroverted evidence in the form of medical records and affidavits which establish by a preponderance of the evidence a misrepresentation or a mistake regarding petitioner's physical qualification as a jet pilot candidate. Affidavits of two Air Force ophthalmologists conclude that petitioner's color vision defect "most likely" existed at the time of the initial medical examination which failed to detect the color vision defect. In the absence of any evidence to the contrary, the Court finds that the initial medical examination yielded an inaccurate result which caused a mistake in fact that petitioner was qualified for jet pilot candidacy.

In analyzing the duty owed where a contract is premised on a mistake as to the existence of a thing that is necessary to the performance that is promised, Corbin concludes that there is a failure of consideration which relieves the party of his duty. *See* Corbin, CORBIN ON CONTRACTS §600, p. 605 (West 1960). Where the parties were mistaken as to existence of a necessary factor and this mistake caused them to contract, it can be inferred that neither one assumed the risk of nonexistence of this material fact. *See id.* As a general rule, if a mistake is in anyway brought about by a material misrepresentation of the other party, equitable relief will be authorized. *See Plains Cotton Cooperative Ass'n v. Wolf,* 553 S.W.2d 800, 804 (Ct. Civ. App.-Amarillo 1977).

Petitioner stated unequivocally in his affidavit that he would never have signed the enlistment contract if he had known that he was not qualified for jet pilot candidacy. Captain Aven's Investigatory Report corroborates this petitioner's position in several respects. The report states that petitioner "had very much wanted to attend flight training," that he stopped attending AFROTC classes after learning of his color vision defect because "he 'lost his drive' for an AF Commission because he could not fly,"

that he would have pursued an AF Commission had he passed his flight physical. The Court finds that the misrepresentation that petitioner was qualified for jet pilot candidacy was material. The Court further finds that the misrepresentation was reasonably relied upon by petitioner.

Accordingly, it is hereby ORDERED that petitioner's Air Force Reserve Officer's Training Corps and enlistment contracts are void and are hereby rescinded.

It is hereby ORDERED that respondents immediately separate the petitioner from the United States Air Force and that he be relieved of all military obligations under his contract.

It is ORDERED that the respondents and the United States Air Force purge its system of records of all entries that petitioner was classified, arrested, confined, and charged as a deserter. It is FURTHER ORDERED that respondents will notify state and federal agencies with whom the Air Force has communicated about the petitioner to purge all entries about the petitioner being classified, arrested, confined, and charged for desertion.

It is ORDERED, ADJUDGED, and DECREED that petitioner's writ of habeas corpus is GRANTED.

SIGNED and ENTERED this 6th day of June, 1985.

/s/ EDWARD C. PRADO
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2567
D.C. Docket No. SA-85-CA-1224

ANDREW J. WOODRICK,
Plaintiff-Appellee,

versus

PETER B. HUNGERFORD, CAPTAIN, ET AL.,
Defendants-Appellants.

FILED
NOV 12 1986

Appeal from the United States District Court for the Western District of Texas

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. It is further ordered and adjudged by this Court that the habeas writ is vacated.

October 1, 1986

ISSUED AS MANDATE: NOV 10 1986
A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ MARY BETH BRECUL
Deputy
New Orleans, Louisiana

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2567

ANDREW J. WOODRICK,
Plaintiff-Appellee,

versus

PETER B. HUNGERFORD, CAPTAIN, ET AL.,
Defendants-Appellants.

U.S. COURT OF APPEALS
FILED
OCT 30 1986

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING
(October 30, 1986)

Before GEE, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX F

AMENDED JUDGMENT IN A CIVIL CASE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS

SA 85 CA 1224

WOODRICK, ANDREW J.
v.

HUNGERFORD, PETER, B., CAPTAIN, COMMANDER, ET AL
EDWARD C. PRADO

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

FILED
AUG 14 1985

IT IS ORDERED AND ADJUDGED

that petitioner's Air Force Reserve Officer's Training Corps and enlistment contracts are void and hereby rescinded; ORDERED that respondents immediately separate the petitioner from the U.S. Air Force and that he be relieved of all military obligations under his contract. ORDERED that the respondents and the U.S. Air Force purge its system of records of all entries that petitioner was classified, arrested, confined, and charged as a deserter. FURTHER ORDERED that respondents will notify state and federal agencies with whom the Air Force had communicated about the petitioner to purge all entries about the petitioner being classified, arrested, confined,

and charged for desertion. ORDERED that Petitioner's writ of habeas corpus is GRANTED.

ENTERED NUN PRO TUNC AS OF 6/6/85

CLERK
CHARLES W. VAGNER

8/14/85

(BY) Deputy Clerk

/s/ TERRI FLORES
TERRI FLORES

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NO. SA-85-CA-1224

ANDREW J. WOODRICK,

Petitioner,

VS.

CAPTAIN PETER B. HUNGERFORD, Commander, Headquarters Squadron, Basic Military Training School, USAF; COLONEL TERRY C. ISAACSON, Commander, Basic Military Training School, USAF; and MAJOR GENERAL CARL R. SMITH, Commander, Air Force Military Training Center; all Lackland Air Force Base, Texas; and VERNE ORR, Secretary of the Air Force,

Respondents.

FILED
JUN 21 1985

ORDER

On this date, the Court considered respondents' Motion for Reconsideration and found it not to meritorious.

ACCORDINGLY, IT IS ORDERED that Respondents' Motion for Reconsideration be and is hereby DENIED.

SIGNED AND ENTERED this 20th day of June, 1985.

/s/ EDWARD C. PRADO
EDWARD C. PRADO
United States District Judge

(2)

No. 86-849

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. WOODRICK, PETITIONER

v.

PETER B. HUNGERFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
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Washington, D.C. 20330

18pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner must exhaust his available intraservice remedies before seeking judicial review of his claim that his enlistment contracts with the military are void by reason of a material misrepresentation as to his fitness to be a fighter pilot.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-849

ANDREW J. WOODRICK, PETITIONER

v.

PETER B. HUNGERFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 800 F.2d 1413. The opinions and orders of the district court (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on October 1, 1986, and a petition for rehearing was denied on October 30, 1986 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1981 petitioner joined the Air Force Reserve Officers Training Program (AFROTC) at Memphis State University. He executed a standard AFROTC contract which required him to participate as a cadet in AFROTC and to accept a commission in the Air Force Reserve upon graduation. Pet. App. 3a. Petitioner enlisted for a minimum of six years and signed a "statement of understanding" which provided that, under certain circumstances, he could be ordered to active duty in his enlisted grade for a period of two years. Specifically, the agreement provided that petitioner could be called to active duty if he was "discontinued from the AFROTC professional officer course" because of "(1) Indifference to training, (2) Disciplinary reasons, (3) Breach or anticipatory breach of the terms of the contractual agreement, [or] (4) Declining to accept a commission" (*id.* at 3a-4a). Petitioner participated in the AFROTC program without incident throughout the 1981-1982 school year (*id.* at 4a).

Before joining AFROTC, petitioner had been given a Department of Defense physical examination to determine whether he was physically qualified for the pilot-candidate program. The examination found that petitioner was qualified and specifically found that he had passed the color vision test. Pet. App. 3a. His AFROTC contract duly noted that petitioner was "qualified to be a pilot candidate" (*ibid.*). In October of 1982, however, petitioner failed the color vision test in a second, precommissioning physical. Since color blindness would disqualify him from flying, petitioner was asked to take the test a third time to verify the results. *Id.* at 4a. He declined

to do so and unilaterally stopped attending AFROTC classes (*ibid.*).

An investigation was ordered into petitioner's failure to attend classes. Petitioner was warned that he could be expelled from AFROTC for cause and called to active duty as an enlisted man. He was given an opportunity to cross-examine witnesses and present evidence on his own behalf. At the conclusion of the investigation, petitioner was expelled from AFROTC for breach of his contract and ordered to active duty in enlisted status, effective May 31, 1984. Pet. App. 4a. Petitioner did not appear for duty and was declared absent without leave (AWOL). After failing to appear for duty within 30 days, petitioner was classified as a deserter. *Id.* at 5a.

On March 21, 1985, petitioner was arrested and transported to Lackland Air Force Base in San Antonio, Texas, to face charges of desertion under Article 85 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 885. Petitioner's commanding officer, respondent Hungerford, ordered an investigation into the desertion charges and requested findings as to whether a court-martial should be convened. Pet. App. 5a; see 10 U.S.C. 832.[1]

2. On April 10, 1985, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. He requested that his enlistment contracts with the Air

[1] At this time, petitioner was examined by two Air Force ophthalmologists, both of whom concluded that petitioner was indeed color blind, that this condition was probably congenital (and therefore in existence at the time of the initial examination), and that it was too severe to be waived for pilot qualification.

Force be rescinded on the ground of fraudulent inducement or mutual mistake, and that the Air Force be ordered to grant him an honorable discharge. Pet. App. 5a. The government moved to dismiss on the ground that petitioner had failed to exhaust his available remedies within the military (*id.* at 5a-6a).[2]

The district court denied the government's motion to dismiss, concluding that petitioner was entitled to a determination of the validity of his contracts prior to any court-martial proceedings. The district court stated that "it must intervene in this case because the court-martial itself is not convened to determine the validity of the petitioner's enlistment contract, but to determine the criminal issues that stem from the breach of what petitioner claims is an unenforceable contract" (Pet. App. 15a). The court also concluded that petitioner would "risk irreparable harm should the court-martial be permitted to determine the criminal desertion issue before first settling the contract issues" (*ibid.*).

On the merits of the contract claim, the district court found that the Air Force's pre-enlistment statement that petitioner was qualified for the pilot-candidate program was a material misrepresentation of fact upon which petitioner had relied in executing his enlistment agreements and that those contracts were, therefore, subject to rescission. Pet. App. 18a. Since the initial contracts were void, the court reasoned, petitioner had not enlisted and the Air Force

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[2] Petitioner subsequently sought a temporary restraining order to enjoin respondents from proceeding with the pre-court-martial investigation under UCMJ Art. 32, 10 U.S.C. 832. That motion, however, became moot when the government agreed to stay the investigation pending disposition of the habeas petition. Pet. App. 6a-7a.

was without jurisdiction over him (*id.* at 6a). The district court therefore granted the writ and ordered the Air Force to separate petitioner immediately and to relieve him of any obligation under his military contracts (*id.* at 18a).

3. The court of appeals unanimously reversed and vacated the writ of habeas corpus. Pet. App. 1a-13a. The court first noted (*id.* at 7a) that petitioner "sought only rescission of the AFROTC and enlistment contracts and his separation [from the Air Force], not intervention in the court-martial" (which, in any event, the government had agreed to stay pending disposition of the habeas action). Thus, while noting that "exhaustion of administrative remedies is required before a civilian federal court can intervene in the proceedings of a court-martial" (*ibid.*, citing *Schlesinger* v. *Councilman*, 420 U.S. 738, 758 (1975)), the court of appeals concluded that the pendency of the pre-court-martial investigation was "immaterial" to the central question before it. That question was whether "exhaustion of administrative remedies must precede invocation of [habeas corpus] to rescind an enlistment contract" (Pet. App. 7a-8a).

The court held that exhaustion of administrative remedies in such circumstances is required. "In addition to the usual reasons for requiring use of established procedures before countenancing resort to litigation," the court of appeals found particularly weighty "the need for limiting civil court intervention in internal military affairs * * *." Pet. App. 9a. The court therefore held that "where a serviceman seeks to effect a rescission of his enlistment contract by means of a habeas writ in federal court, he must show that he has exhausted all available intraservice remedies." *Ibid.* (citing *Mindes* v. *Sea-*

man, 453 F.2d 197, 201 (5th Cir. 1971)). The court recognized that exceptions to the exhaustion doctrine would exist where "pursuit of intraservice remedies would be futile or would cause [the serviceman] to suffer irreparable harm" (Pet. App. 9a). But the court canvassed the remedies available to petitioner within the military and concluded that they were not "futile" and that petitioner had not "shown that he would have suffered irreparable injury" in pursuing them. Specifically, the court concluded that petitioner had three available options: (1) a request for discharge in lieu of court-martial, pursuant to Air Force regulations; (2) a petition to the Air Force Board for the Correction of Military Records (AFBCMR), pursuant to 10 U.S.C. 1552; and (3) a Complaint of Wrongs filed against his commanding officer, pursuant to UCMJ Art. 138, 10 U.S.C. 938.

4. The mandate of the court of appeals issued on November 10, 1986, and the district court dismissed the writ a week later. Petitioner's motion for a recall of the mandate and a stay of the pre-court-martial investigation was denied by the court of appeals on November 26, 1986. Petitioner's application to this Court for a stay was denied by Justice White on January 29, 1987.

The Article 32 investigation into petitioner's case was completed on January 12, 1987, and the case was referred to a general court-martial scheduled for February 24, 1987.[3] Petitioner in the meantime

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[3] The information set forth in this paragraph is not contained in the record that was before the court of appeals. It is derived from petitioner's stay papers in this Court, from the record of the Court of Military Appeals proceeding (see page 7, *infra*), and from information supplied to us by the Air Force.

availed himself of several avenues of potential relief within the military. First, he filed a petition for a discharge with the AFBCMR, which is currently pending. Second, he filed a Complaint of Wrongs against his commanding officer under UCMJ Art. 138, 10 U.S.C. 938. On April 6, 1987, the Office of the Judge Advocate General, acting on behalf of the Secretary of the Air Force, determined that the wrongs complained of by petitioner were cognizable under Article 138 and ordered that petitioner's complaint be investigated and acted upon within 45 days. Third, on January 13, 1987, petitioner filed a habeas corpus petition in the Court of Military Appeals, contending that the court-martial scheduled to consider his case lacked personal jurisdiction over him. Petitioner sought "an order directing the Respondents to release the petitioner civilian from military control, to cease court-martial action against him, and to expunge all federal records alleging petitioner deserted from the armed forces." Petition for Extraordinary Relief 1 (Jan. 13, 1987). On February 18, 1987, the Court of Military Appeals granted a stay of the court-martial and issued an order to respondents to show cause why the requested relief should not be granted. The issues have been briefed by the parties—the Air Force argued that the issues are not yet ripe for resolution but should be decided as an initial matter within the context of the court-martial—and oral argument is scheduled for April 15, 1987. Meanwhile, the stay of the court-martial is still in effect.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's contentions are now pending before the appropriate military authorities, and review by this Court plainly is not warranted at this time.

1. The decision of the court of appeals fully accords with the general rule that federal courts will not entertain habeas petitions from members of the military until all available intraservice remedies have been exhausted. *Noyd* v. *Bond*, 395 U.S. 683, 693 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 558-559 n.8 (Fed. Cir. 1986) (collecting authorities); *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971).[4] Petitioner attempts (Pet. 12-14) to evade this settled rule by arguing that without immediate federal court intervention the military will subject to court-martial a civilian over whom it has no jurisdiction. Petitioner cites (Pet. 14) a series of this Court's cases intervening in and precluding such courts-martial. *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employee); *Reid* v. *Covert*, 354 U.S. 1 (1957) (spouse of serviceman); *United States ex rel. Toth* v. *Quarles*,

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[4] This rule is just one application of the broader principle favoring the exhaustion of administrative remedies generally. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The principle applies, however, with special force in the military context, a context in which "[n]ot only is the scope of Congress' constitutional power * * * broad, but the lack of competence on the part of the courts is marked" (*Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981)). See *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-758 (1975); Pet. App. 9a.

350 U.S. 11 (1955) (discharged serviceman). See also *Schlesinger* v. *Councilman*, 420 U.S. at 758-759.

Petitioner's argument is flawed in two principal respects. First, as the court of appeals noted (Pet. App. 7a), petitioner's Complaint did not ask the district court to enjoin his court-martial; indeed, no court-martial had even been convened at the time petitioner brought this lawsuit. Rather, petitioner asked the district court to rescind his enlistment contracts. Thus, the principal question here is whether the validity of a serviceman's enlistment contracts should be decided, as an initial matter, by the military. Permitting petitioner to bring his dispute directly to federal court—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond*, 395 U.S. at 696): "If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

Second, even if petitioner's court-martial, which has been stayed by the Court of Military Appeals, were at issue in this case, the premise of his argument—that he is a civilian—prejudges the merits of his claim. In the cases cited by petitioner it was undisputed that the individual being court-martialed was not currently in military service. Petitioner, by contrast, took the oath of enlistment in the Air Force Reserve and did so with "the capacity to understand the significance of enlisting in the armed forces."

10 U.S.C. (& Supp. III) 802(b). See also *In re Grimley*, 137 U.S. 147, 156-157 (1890). And petitioner has not claimed that he has been officially discharged from the military. Thus, the question whether petitioner is currently in military service is a disputed one that hinges on the proper construction of his enlistment contracts, and it is a question that the military, under settled principles, should be permitted to decide in the first instance.

Petitioner's contention (Pet. 14) that a court-martial could not consider the validity of his enlistment contract is mistaken. Lack of personal jurisdiction over the defendant is, in fact, a complete defense to the charge of desertion since membership in the armed forces is an element of that offense. 10 U.S.C. 885. The government must prove personal jurisdiction over petitioner in any future court-martial proceeding beyond a reasonable doubt. *United States* v. *Marsh*, 15 M.J. 252, 254 (C.M.A. 1983); *United States* v. *Bailey*, 6 M.J. 965, 969 (N.C.M.R. 1979). Thus, this Court's admonition in *Schlesinger* v. *Councilman*, 420 U.S. at 758, is fully applicable to the instant case:

> [W]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction or otherwise.

In short, because the federal courts would be perfectly capable of considering petitioner's contentions about the alleged invalidity of his enlistment contracts if and when those contentions have been rejected by a court-martial (*Burns* v. *Wilson*, 346 U.S.

137 (1953)), review by the federal courts would be both premature and improper at this time.[5]

2. The court of appeals correctly pointed out (Pet. App. 9a) that exhaustion of intraservice remedies is not required where pursuit of such remedies would be futile or cause irreparable harm. Petitioner's assertion (Pet. 17-19) that the three intraservice remedies discussed by the court of appeals are so "defective" as to be futile is quite unconvinc-

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[5] Petitioner makes two other arguments on the general question of exhaustion, neither of which is persuasive. Contrary to petitioner's contention (Pet. 16), the fact that the district court did not require exhaustion does not preclude the court of appeals from reaching a contrary result. While the doctrine of exhaustion of remedies does not necessarily deprive a district court of the *power* to act (see *Schlesinger* v. *Councilman*, 420 U.S. at 753-758), the district court's determination to overlook the exhaustion requirement in petitioner's case is not insulated from review by the court of appeals. *McLucas* v. *DeChamplain*, 421 U.S. 21, 26-27, 32-34 (1975); *Schlesinger* v. *Councilman*, 420 U.S. at 753-758; *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972).

Second, again contrary to petitioner's contention (Pet. 16), there is no general exception to the exhaustion requirement where criminal proceedings are imminent. Petitioner's reliance on *McKart* v. *United States*, 395 U.S. 185 (1969), for that proposition is completely misplaced. The question in *McKart* was whether the defendant in a criminal proceeding in federal court was precluded from raising a defense that he had failed to pursue administratively. The Court specifically noted (395 U.S. at 196-197): "We are not here faced with a premature resort to the courts—all administrative remedies are now closed to petitioner." In the instant case, by contrast, petitioner's resort to the courts is premature. He not only has several administrative remedies available to him short of defending a court-martial, but even if he should be court-martialed, he could raise in that forum his defense that his enlistment contract was void *ab initio*.

ing, particularly in light of the subsequent history of this case. Petitioner in fact has availed himself, at last, of two of those avenues of relief. He has petitioned the AFBCMR for a discharge,[6] and he has filed an Article 138 Complaint of Wrongs against his commanding officer.[7] Both of these actions are still pending within the military.

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[6] Despite some historical uncertainty over the authority of the Board to grant a discharge (see *Pence* v. *Brown*, 627 F.2d 872, 875 n.5 (8th Cir. 1980)), the Secretary of the Board filed an affidavit in this case indicating that the Secretary of the Air Force, acting upon the recommendation of the Board, is so empowered. Pet. App. 11a. The Board's statutory grant of jurisdiction to "correct any military record * * * when * * * necessary to correct an error or remove an injustice," 10 U.S.C. 1552, would certainly seem to embrace that power. In any event, the question has now been presented to the Board for initial resolution, as it should have been at the outset.

Petitioner's contention (Pet. 17) that the Board's procedures are too slow to forestall his court-martial was properly rejected by the court of appeals, which noted that petitioner could have petitioned the Board several years ago "once he learned that he was not medically qualified to fly." Pet. App. 11a. See also *Seepe* v. *Department of the Navy*, 518 F.2d 760, 765 (6th Cir. 1975); *Adkins* v. *United States Navy*, 507 F. Supp, 891, 899 (S.D. Tex. 1981). In any event, petitioner's court-martial has now been stayed indefinitely.

[7] The three grounds advanced by petitioner (Pet. 18) for not filing such a Complaint before resorting to federal court are unconvincing. Petitioner's Complaint was properly directed at his commanding officer for that officer's alleged failure "to investigate his contractual claims and initiate separation action." Pet. App. 12a. Such claims are not related to military discipline, and petitioner's contention that he cannot use Article 138, on the theory that he is not a member of the armed forces, again prejudges the merits of his Complaint. Presumably he would have no objection if the Air

The third potential means of relief discussed by the court of appeals—a discharge in lieu of trial by court-martial—is also available to petitioner. As the court of appeals correctly noted (Pet. App. 11a), "it is possible that [petitioner] could have obtained an honorable discharge through this avenue." See Air Force Reg. 39-10, paras. 1-16, 1-19 and 4-2 (Oct. 1, 1984). Petitioner presents no support for his contention to the contrary (Pet. 18). Furthermore, even if petitioner were to receive in lieu of trial by court-martial a discharge that was other than honorable, he would be free to petition the AFBCMR to have the status of his discharge changed. As we have noted, the AFBCMR is authorized to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552.

Petitioner has also pursued a fourth avenue not discussed by the court of appeals. He has sought extraordinary relief from the Court of Military Appeals, which has stayed his court-martial pending resolution of his claim of wrongful induction. A decision in his favor by that court would completely forestall the court-martial and provide petitioner with all the relief he has requested.

Petitioner has failed to show not only that the avenues of relief afforded him within the military are futile, but also that he would suffer irreparable harm by having to resort to them. First, petitioner may well avoid court-martial and obtain a discharge from

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Force, upon completion of the Article 138 process, agreed with him. In any event, the Office of the Judge Advocate General has now determined that petitioner's claims are cognizable in an Article 138 Complaint and has ordered a prompt resolution of those claims.

the Air Force by one of the means that he is currently pursuing or could pursue. Second, even if petitioner is ultimately court-martialed, this Court has already indicated that " 'the cost, anxiety, and inconvenience' " of having to defend against a court-martial cannot " 'by themselves be considered "irreparable" in the special legal sense of that term.' " *Schlesinger* v. *Councilman*, 420 U.S. at 755 (quoting *Younger* v. *Harris*, 401 U.S. 37, 46 (1971)).

In short, the exhaustion rule applied by the court of appeals is fully in accord with settled authorities. Its conclusions that intramilitary remedies were available to petitioner and that petitioner had failed to show irreparable harm were both correct. The decision below thus warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40291

EDITOR'S NOTE

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REPLY BRIEF

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ANDREW J. WOODRICK, Petitioner	§	
VS.	§	NO. 86-849
CAPTAIN PETER B. HUNGERFORD, ET. AL., Respondents	§	

MOTION TO DISMISS
BRIEF FOR THE RESPONDENTS IN OPPOSITION
DUE TO DISSIMULATION

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner moves the court to dismiss respondents' brief in opposition to a petition for certiorari on grounds of dissimulation.

Respondents have gone outside the record into matters that need to be correctly stated.

First, respondents state the petitioner has a cognizable claim under Article 138, Uniform Code of Military Justice (Resp. Brief 7). This brief was the first petitioner was aware of such an assertion. After tossing the complaint of wrong from one general court-martial authority to another (Exhibit 1), the Air Force held the complaint was not cognizable (Exhibit 2).

Second, respondents assert that petitioner never asked the U.S. District Court to intervene in his court-martial (Resp. Brief 9). This position is contrary to the position of respondents' answer to show cause (p. 14 n. 5) before the U.S. Court of Military Appeals (Exhibit 3), whereby respondents stated:

> In this respect, we think the Court of Appeals was clearly wrong in suggesting that Councilman did not apply in the federal action because petitioner did not seek intervention in his court-martial. Clearly, he did seek such intervention by moving to enjoin his court-martial.

Third, respondents assert that petitioner has sought relief before the Air Force Board for Correction of Military Records. Interestingly, the government's advisory opinion to the board recommended denial and never once discussed the merits of the misrepresentation claim.

Respectfully submitted,

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3 Atchs
1. Ex. 1, 12 AF/JA Ltr, 5 Jan 87
2. Ex. 2, ATC/CC Ltr, 3 Feb 87
3. Ex. 3, Respondents Answer to USCMA

Certificate of Service

I, John M. Economidy, counsel of record for petitioner Andrew J. Woodrick, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 20th day of April 1987, I served three copies of the above motion to dismiss on each of the several parties thereto, as follows:

1. On the United States, by mailing three copies in a duly addressed envelope, with first class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Department of the Air Force, by mailing three copies in a duly addressed envelope, with first class postage, prepaid, to counsel for respondents, General Litigation Division, HQ USAF/JACL, The Pentagon, Room 5E425, Washington, D.C. 20330-5130.

Respectfully submitted,

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (TAC)
BERGSTROM AIR FORCE BASE TX 78743-5002

REPLY TO
ATTN OF: JA

5 January 1987

SUBJECT: Complaint of Wrong Under Article 138, UCMJ

TO: 3708 BMTS (A1C Andrew J. Woodrich)
Lackland AFB TX 78236-5000

1. Your complaint was received at this Headquarters on 5 January 1987.

2. Although your case has been transferred to this Headquarters for purposes of court-martial jurisdiction, General Cunningham does not exercise general court-martial jurisdiction over your commander. As Article 138, UCMJ, requires that the complaint be forwarded to the commander exercising general court-martial jurisdiction over the commander who allegedly committed the wrong, your complaint has been forwarded to the Staff Judge Advocate, Air Training Command, for appropriate disposition.

3. Any further correspondence concerning your complaint should be addressed to HQ ATC/JA, Randolph AFB TX 78148-5000.

FOR THE COMMANDER

LUDOLF R. KURNELL III
Colonel, USAF
Staff Judge Advocate

cc: HQ USAF/JACD
Lackland AFB TX
HQ ATC/JA w/Atch
Randolph AFB TX

Readiness is our Profession

Exhibit 1

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR TRAINING COMMAND (ATC)
RANDOLPH AIR FORCE BASE TX 78150-5001

3 FEB 1987

REPLY TO ATTN OF: CC

SUBJECT: Complaint of Wrong Under Article 138, UCMJ

TO: AB Andrew J. Woodrick
3708 BMTS
Lackland AFB TX 78236-5000

1. The complaint of wrong which you filed with the Commander, 12th Air Force, has been forwarded to me for action. I have carefully reviewed your request for discharge, your commander's action on your request, and the background documentation you submitted with your complaint.

2. AFR 110-19 governs the processing of Article 138 complaints. Paragraph 2a of that regulation provides that "except for complaints that involve pre-trial and post-trial confinement, complaints relating to military discipline . . . are not cognizable as Article 138 complaints under this regulation." Although your redress of grievance requested discharge under AFR 39-10, the basic issue underlying your complaint concerns whether you are presently subject to military jurisdiction. This entire issue will be resolved within the framework of the military judicial system. Since the subject matter of your complaint is already under consideration within the military judicial system, you must look to that channel for resolution of your complaint. This channel will afford you proper measures for redressing the wrong of which you complain.

3. This decision constitutes final action on your complaint.

John A Shaud

JOHN A. SHAUD
Lieutenant General, USAF
Commander

cc: HQ USAF/JACM

AIR FORCE—A GREAT WAY OF LIFE

Exhibit 2

Lest there be any misunderstanding, we do not cite Councilman to suggest that this Court is without authority to act in petitioner's court-martial case through the extraordinary writ power. Rather, we cite Councilman to illustrate two general propositions as they relate to the posture of petitioner's federal civil court action vis-a-vis his court-martial. First, military courts are entitled to deference and comity by federal courts to the same extent as are state courts. Second, military courts are capable of and responsible for resolving factual and legal issues, especially those issues relating to the extent of their own jurisdiction. These concepts are important because when petitioner was charged with desertion by the military authorities his contractual dispute, which at that point had not been brought to the federal courts' attention, lost whatever civil character it had and became wholly military in nature. His suit for habeas relief and a temporary restraining order in federal court, filed after the charge of desertion was preferred and acted upon by the convening authority unquestionably constituted a collateral attack on the jurisdiction of the military court, a situation to which Councilman specifically applies, and which Councilman prohibits save in very specific exceptions.[5]

[5]In this respect we think the Court of Appeals was clearly wrong in suggesting that Councilman did not apply in the federal action because petitioner did not seek intervention in his court-martial. Clearly, he did seek such intervention by moving to enjoin his court-martial. While the Air Force's agreement to stay the proceedings temporarily mooted the request for a temporary restaining order, it is clear that the stay would not have been imposed had it not been for petitioner's attempt to have the District Court intervene in the court-martial.